

After stipulations were taken at the regular hearing held on December 12, 2002, the case could not proceed because an interpreter was not present for the hearing. Consequently the Administrative Law Judge (ALJ) set terminal dates and the parties agreed the claimant's deposition would be taken within the established terminal dates. The claimant's terminal date for the submission of evidence was February 17, 2003, and respondent's terminal date was March 17, 2003. But no additional evidentiary depositions were taken within the terminal dates. Accordingly, on May 8, 2003, the ALJ found the

claimant had not sustained her burden of proof that she suffered a work-related injury on June 16, 1996, and denied the claim for benefits.

Claimant requested this review. Claimant's counsel notes that he was in a serious car accident on January 21, 2003, and hospitalized. After surgery and rehabilitation he returned to work in May 2003. Claimant argues the failure to present evidence was caused by her counsel's unexpected incapacity. Claimant requests the Award be set aside and the matter be remanded to complete the taking of evidence.

Respondent argues claimant's request for remand should be denied because her counsel failed to request assistance from other counsel to assist in the presentation of the case and did not request a continuance or extension of terminal dates. Because claimant failed to meet her burden of proof, the respondent argues the ALJ's Award denying benefits should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

In a workers compensation proceeding, the claimant has the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends.¹ The "burden of proof" is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.² The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. All the evidence is presented to the ALJ. K.S.A. 44-523(b) provides for establishment of terminal dates for completion of the submission of evidence. After the parties have fully submitted the evidence, the ALJ issues a decision based on the record.

It is undisputed that claimant did not testify at the scheduled regular hearing because an interpreter was not present. The parties agreed that claimant's testimony would be submitted by a deposition to be taken within the claimant's terminal date. And the parties were also scheduling doctor's evidentiary depositions. But claimant's counsel was apparently severely injured in an automobile accident on January 21, 2003. Claimant's counsel notes that he was hospitalized and later required brain surgery followed by treatment in a rehabilitation hospital. Claimant's counsel returned to work in May 2003.

¹ K.S.A. 1996 Supp. 44-501(a).

² K.S.A. 1996 Supp. 44-508(g).

It is disputed whether there was an agreement between the parties to continue the matter until claimant's attorney was able to return to work. Claimant's brief indicates there was such an agreement but respondent's brief indicates there was no agreement to continue the matter until May 2003. Respondent's brief just indicates there were discussions with claimant's attorney in February 2003 about rescheduling depositions. It appears the claimant's attorney underwent the surgical procedure after those discussions.

If there were discussions between the parties about rescheduling depositions, it would have been better practice for claimant's counsel to have notified the ALJ and requested an extension of terminal dates. Nonetheless, under the unique circumstances of this case, such failure could constitute excusable neglect. And because the Award was entered shortly after claimant's counsel returned to work, it was then too late to request an extension of terminal dates.

A record may be reopened for good cause shown as provided by K.S.A. 44-523(b)(4) (1993 Furse) in order to accept additional evidence. In her brief to the Board, claimant offered an explanation of unique circumstances that could clearly form the basis for a showing of good cause. Respondent does not agree. Accordingly, in the interest of justice, the Board finds that this matter should be remanded to the ALJ for hearing to afford the parties an opportunity to fully inform the court concerning the merits of the request to reopen the record.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge John D. Clark dated May 8, 2003 should be, and hereby is, set aside and this matter remanded to the Administrative Law Judge for further proceedings and orders as may be necessary including a final determination of the claim.

IT IS SO ORDERED.

Dated this _____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Phillips Jr., Attorney for Claimant
 Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director